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No. 93-387

In the Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL P. MARVICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the entry of premises that petitioner rented to Collin Quick, to execute an arrest warrant issued after Quick absconded from parole supervision, violated petitioner's Fourth Amendment rights.

2. Whether the district court was clearly erroneous in crediting the testimony of officers who testified in the civil forfeiture proceeding.

3. Whether petitioner is entitled to claim, for the first time in this Court, that the forfeiture was an excessive fine under the Eighth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is unpublished, but the judgment is noted at 990 F.2d 1263 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1993. A petition for rehearing was denied on June 24, 1993. Pet. App. B1. The petition for a writ of certiorari was filed on September 9, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial, the United States District Court for the Central District of California ordered the property at 2695 Canary Drive in Costa Mesa, California, forfeited to the United States pursuant to 21 U.S.C. 881(a)(7). Petitioner, the claimant to that property, appealed that civil judgment of forfeiture. The court of appeals affirmed. Pet. App. A1-A6.

1. In January 1990, federal agents conducting a narcotics investigation learned that Collin Quick was living at 2695 Canary Drive in Costa Mesa, California. A state parole arrest warrant had been issued because Quick had absconded from parole supervision and thus was considered a "parolee-at-large." After the federal agents contacted the California Department of Corrections, Special Parole Agent Brenda Lucas joined the investigation. At Lucas's request, agents surveilled the Canary Drive residence from January 22 through 25, 1990, during which time they saw Quick freely enter and exit on a daily basis without knocking. Gov't C.A. Br. 3-4.

On January 25, 1990, at about 7:20 p.m., Agent Lucas and the others entered the Canary Drive residence to execute the arrest warrant and conduct a parole search of Quick's living areas. Quick and petitioner were found in the living room, where they were detained while agents went through the house to locate additional persons and initiate the parole search. Investigator Larry Thayer, after smelling marijuana inside a first floor bedroom, opened the closet door and discovered a green trash bag containing a large quantity of marijuana. He reported his observations to Officer Rudisill. Rudisill then obtained a state search warrant, which the agents executed at about 11:45 p.m. Gov't C.A. Br. 4-5.

The agents ultimately found more than 20 pounds of marijuana, more than three kilograms of metham-

phetamine, two grams of cocaine, and various items of drug paraphernalia. The drugs and paraphernalia were scattered throughout the residence. For example, large quantities of marijuana were found in a downstairs room (also containing papers addressed to petitioner), in an enclosed patio, and throughout the attic (including in a cardboard box addressed to petitioner). Pet. C.A. Excerpts of Record (E.R.) 27-29 (district court's findings of fact).

2. The United States subsequently filed a civil action seeking forfeiture of the Canary Drive property, pursuant to 21 U.S.C. 881(a)(7), as "property [that] was used to store, conceal and distribute marijuana, methamphetamine and cocaine." E.R. 10-14 (Verified Complaint). Petitioner, in turn, filed a verified claim to the property and an answer to the complaint. *Id.* at 15-18, 19-25. In both pleadings he contended that the parole warrant used to justify the entry of the premises was illegal because "Collin Lee Quick was not validly on parole." *Id.* at 16, 21. Petitioner subsequently moved to suppress the evidence seized from the Canary Drive residence, renewing his contention that Quick had never validly been on parole and further claiming that the arrest warrant for Quick was based on the fruits of an unlawful search in 1987 of Quick's prior residence. See *id.* at 45-51. The hearing on petitioner's motion was consolidated with the trial. Pet. App. A2.

3. After a bench trial, the district court denied petitioner's motion to suppress and entered an order of forfeiture. Pet. App. A2. The court held that petitioner "has no standing to challenge the validity of Quick's warrant or [Quick's] arrest." E.R. 37 (Supplemental Memorandum). Additionally, the court held that "[e]ven if [the search] warrant (and the arrest warrant) were invalid, here the *Leon* exception applies: the officers acted in objective good faith in their actions." *Ibid.* (citing

United States v. *Hunt*, 893 F.2d 1028, 1032 (9th Cir. 1990), cert. denied, 112 S. Ct. 107 (1991), which had applied the principles of *United States* v. *Leon*, 468 U.S. 897 (1984), to an arrest warrant). See also E.R. 9 (reaffirming holding in order denying new trial).

On the merits, the district court found that the Canary Drive property was used to facilitate drug crimes, that petitioner "failed to exercise due care to prevent the illegal use of the defendant real property, was willfully blind, and consented to the illegal use of the property," and that petitioner himself "used the defendant real property to facilitate the transportation, sale, receipt, possession or concealment of a controlled substance" in violation of law. E.R. 29-30. Accordingly, the court held that petitioner had not carried his burden of proving that he was an "innocent owner." *Id.* at 33. In that regard, the court noted that "[s]hortly before the seizure of the drugs, paraphernalia and associated drug-dealer's evidence, [petitioner] was tape recorded discussing a drug transaction with an undercover informant." *Id.* at 37 (Supplemental Memorandum). The court concluded that petitioner "has proved himself far from 'innocent' in this area" and that, "[g]iven his own involvement in drug transactions, or attempts at the same, his testimony that he knew nothing about what was going on in his own home is not entitled to any credibility." *Id.* at 37-38.

The district court subsequently denied, as "meritless," petitioner's motion for a new trial. E.R. 8-9. The court explained that, "[f]or the most part, [petitioner] quarrels with the court's findings of fact, which were based largely on credibility determinations." *Id.* at 9. Accordingly, the court entered a judgment forfeiting the Canary Drive property to the United States. *Id.* at 5-7.

4. The court of appeals affirmed. Pet. App. A1-A6. It first rejected petitioner's Fourth Amendment challenge.

Citing its prior unpublished opinion in *United States* v. *Quick*, No. 88-5166 (9th Cir. Dec. 12, 1989) (*reprinted at* Pet. App. C1-C4), the court refused to consider petitioner's contention that Quick had never validly been placed on parole under California law. Pet. App. A2-A3. The court explained that, "[t]o the extent [petitioner] contests the validity of Quick's arrest warrant and actual arrest, we find that he has no standing." *Id.* at A3 (citing *Rakas* v. *Illinois*, 439 U.S. 128, 133-134 (1978), and *United States* v. *Robertson*, 833 F.2d 777, 779 (9th Cir. 1987)).

The court, "[t]aking Quick's arrest warrant therefore as valid," then concluded that "the arresting officers were entitled to enter the defendant property to arrest Quick." Pet. App. A3. The court rejected petitioner's assertion that Quick was merely "a temporary house guest," explaining that "the evidence adduced at trial clearly demonstrates that Quick resided at the defendant property." *Ibid.* n.1 (noting officers' surveillance and fact that petitioner "himself acknowledged on cross-examination that Quick rented rooms in the house for about one year"). Accordingly, "[b]ecause Quick resided at the defendant property, it was lawful for officers to enter the property to arrest Quick, and their entry does not violate any expectation of privacy on the part of" petitioner. *Id.* at A3-A4. The court refused to consider petitioner's additional challenges to the scope of the search, explaining that petitioner had not "raised * * * these arguments in his pre-trial motion to suppress and offers no explanation for why he did not do so." *Id.* at A4-A5 (citing *United States* v. *Restrepo-Rua*, 815 F.2d 1327, 1329 (9th Cir. 1987)).

Finally, the court of appeals rejected petitioner's contention that the forfeiture judgment could not stand because two government agents had committed perjury by giving trial testimony allegedly inconsistent with their

prior statements. Pet. App. A5-A6. The court noted that petitioner's counsel "thoroughly cross-examined both witnesses at trial regarding the inconsistencies" and that "the district court then made findings which it explicitly noted were 'based largely on credibility determinations.'" *Id.* at A5 (quoting district court's order denying new trial). The court rejected petitioner's claim of perjury because petitioner pointed to no "circumstances that were not before the fact-finder." *Id.* at A5-A6.

ARGUMENT

1. Petitioner renews his claim (Pet. 8-15, 20-22) that the entry of his home to execute a state parole arrest warrant against Collin Quick was illegal because Quick was never validly on parole. Even if the arrest warrant was invalid, however, the officers were entitled to rely in objective good faith upon its validity. See generally *United States* v. *Leon*, 468 U.S. 897 (1984).

Petitioner was of course entitled to challenge the entry and search of his residence based on the arrest warrant. The court of appeals correctly held, however, that petitioner had not timely raised such challenges in the district court. Pet. App. A4-A5; see generally Fed. R. Crim. P. 12(b)(3) (motions to suppress must be raised prior to trial) and 12(f) (untimely motions are waived). Nor was it plain error not to invalidate the entry and search of petitioner's residence. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 113 S. Ct. 1770 (1993). The arrest warrant for Quick justified entry of the home where Quick was residing. See *Payton* v. *New York*, 445 U.S. 573, 602-603 (1980). Petitioner's belated reliance on *Steagald* v. *United States*, 451 U.S. 204 (1981), which generally requires a search warrant to enter the residence of a "third party" to execute an arrest warrant (*id.* at 205), is misplaced given that "the evidence adduced at

trial clearly demonstrates that Quick resided at the defendant property." Pet. App. A3 n.1.

Nor did the court of appeals commit plain error in failing to entertain a challenge to the conduct of a limited search before the officers obtained the search warrant. While petitioner did not preserve that challenge for review, the actions leading to the initial discovery of marijuana were justified both as a valid protective sweep of the premises (*Maryland* v. *Buie*, 494 U.S. 325 (1990)), and as a valid parole search of Quick's living quarters (*Griffin* v. *Wisconsin*, 483 U.S. 868 (1987)).

2. Petitioner next claims (Pet. 15-17) that the forfeiture order cannot stand because the district court allowed the presentation of "perjured testimony." As the district court suggested in denying petitioner's motion for a new trial as "meritless" (E.R. 9), petitioner's claim is but a thinly disguised attack on the district court's credibility findings.[1] There is no basis for further review.

3. Finally, petitioner argues (Pet. 18-19), for the first time in this Court, that forfeiture of his residence violated the Excessive Fines Clause of the Eighth Amendment because it was disproportionate to his wrongdoing. In support of his position, petitioner relies upon *Austin*

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[1] Petitioner's claim is apparently based on Officer Larry Thayer's sworn declaration (E.R. 63), which he reaffirmed on cross-examination (see 2 R.T. 158-159), that he could "smell the strong odor of marijuana" even before opening the door to a downstairs room. Petitioner claimed that those sworn statements were inconsistent with fellow Officer Rudisill's search warrant affidavit reporting that Thayer had told him that "[w]hile in this bedroom he could smell a heavy odor of [m]arijuana" (E.R. 68). The alleged inconsistencies were fully aired at trial. The district court credited Officer Thayer's sworn testimony when it found that "[t]here was a strong odor of marijuana that permeated, at a minimum, the downstairs room and hallway of defendant real property." E.R. 29.

v. *United States*, 113 S. Ct. 2801 (1993), which held that the Excessive Fines Clause applies to forfeitures under the Controlled Substances Act and which petitioner claims should be accorded "full retroactivity." We agree that *Austin* would apply to cases that were not yet final (*i.e.*, cases in which the time to petition for certiorari had not yet expired) at the time it was decided. See *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6, 328 (1987). Petitioner's reliance on *Austin* fails, however, not because of any principle of retroactivity but rather because petitioner waived the claim he now seeks to raise. Petitioner never before claimed that—and the courts below never considered whether—the forfeiture was excessive or disproportionate to petitioner's wrongdoing. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 112 S. Ct. 1735, 1738 (1992) (internal quotation marks omitted).

There is nothing exceptional about this case that would justify abandoning this Court's traditional rule against considering issues neither raised nor considered in the lower courts. Petitioner's only explanation for his default is that "the law was otherwise when his trial and appeal occurred, i.e., the authority of *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)" (Pet. 19). But *Calero-Toledo* involved the scope of an innocent owner defense—not the interpretation of the Excessive Fines Clause. While at least one court deemed the reasoning of *Calero-Toledo* inconsistent with any claim that the Eighth Amendment requires proportionality review (see *Austin*, 113 S. Ct. at 2803, discussing lower court opinion), this Court, without purporting to overrule *Calero-Toledo*, disagreed. See *Austin*, 113 S. Ct. at 2810. Therefore, it cannot fairly be said that the Court in *Austin* overruled a prior decision that otherwise pre-

cluded petitioner's claim. Cf. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 320-321 & n.6 (1971).[2]

Finally, it cannot be said that the forfeiture in this case amounted to plain error under *Austin*. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 113 S. Ct. 1770 (1993). While the *Austin* Court did not decide the specific standards that should govern proportionality review (see 113 S. Ct. at 2812 & n.15), the forfeiture here was not disproportionate, and certainly was not plainly disproportionate, under any conceivable standard. For example, Justice Scalia has suggested that the sole inquiry should be "whether the confiscated property has a close enough relationship to the offense." *Austin*, 113 S. Ct. at 2815 (concurring in part and concurring in the judgment; emphasis omitted). Here, where large quantities of illegal drugs and drug paraphernalia were found throughout the house, on the patio, and in the attic, the answer clearly is in the affirmative. Moreover, assuming some monetary standard had to be satisfied, the street value of the drugs seized from the house—including some $23,000 worth of marijuana and some $70,000 worth of methamphetamine (see E.R. 56)[3]—was sufficient to support for-

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[2] Although petitioner does not mention it, a Ninth Circuit decision had held that the Eighth Amendment did not require proportionality review in a civil forfeiture action. See *United States* v. *Tax Lot 1500*, 861 F.2d 232, 233-235 (1988), cert. denied, 493 U.S. 954 (1989). The Ninth Circuit, however, appeared to leave open the possibility of exercising "judicial restraint" to limit the scope of forfeiture in certain cases. *Id.* at 235. Thus, petitioner cannot claim, even under then-prevailing Ninth Circuit law, that he was precluded from urging the courts below to apply proportionality analysis.

[3] Officer Rudisill indicated that some 23 pounds of marijuana and 3,167 grams of methamphetamine (*i.e.*, almost seven pounds) had been found throughout the house. He explained that the price of marijuana on the date of the search was about $1,000 per pound

feiture. Accordingly, there is no basis for initial review in this Court of petitioner's defaulted Eighth Amendment claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1993

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and that the price of methamphetamine was about $10,000 per pound. See E.R. 56.